



ACTA
AMERICAN COUNCIL OF
TRUSTEES AND ALUMNI

March 8, 2013

The Honorable Arne Duncan
Office of the Secretary
U.S. Department of Education
LBJ Education Building, 7W311
400 Maryland Avenue, SW
Washington, DC 20202

Dear Secretary Duncan:

On December 31, 2012, the American Council of Trustees and Alumni filed a complaint with the Department charging that the Southern Association of Colleges and Schools (SACS) acted without authority in placing the University of Virginia on warning. On February 11, 2013, the Department mailed its determination (attached). For the reasons explained in our response, we are appealing the decision and asking you to reverse the staff determination.

SACS' decision amounts to wrongful interference with institutional autonomy and governance powers vested in the Board of Visitors by the state legislature of the Commonwealth of Virginia. No question has been raised about UVA's academic quality.

This is not the first time SACS has interfered in matters of institutional governance—nor is SACS the only accreditor to do so. In January, SACS announced it was investigating the involvement of Florida's governor in the decision of the University of Florida president to remain in office. In December 2011, SACS reprimanded the Florida governor for suggesting publicly that the Florida A&M board should suspend its president after the disturbing hazing death of a drum major.

As noted in the attached op-ed by former Senator and University of Colorado president Hank Brown, in 1992, the Western Association of Schools and Colleges threatened the accreditation of California's Thomas Aquinas College unless it changed its exemplary Great Books program of classic readings to a more "open" curriculum. In 2007, when the University of California regents attempted to deal with runaway administrative costs through salary and benefit changes, they were subject to accreditor complaints that trustees were "unnecessarily harsh" with administrators.

The independence of our colleges and universities is critical to ensuring that America's higher education system remains the finest in the world. Far from protecting independence, the accreditors are undermining it—and the principle of federalism which undergirds it. Accreditors' interference in institutional governance may be common, but it is also wrong and should end.

Of course, all of this might be ignored if the accreditors were otherwise doing their job—ensuring "educational quality" in their statutory role as gatekeepers of billions in federal

PROMOTING ACADEMIC FREEDOM AND EXCELLENCE

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financial aid. But the fact is: **Under the accreditation regime, quality has declined and cost has skyrocketed.** While SACS was busy interfering with the governance of the University of Virginia, it notably was ignoring the long list of schools it accredits with six-year graduation rates less than 50%. Some even have six-year graduation rates at 25% or below.

In his State of the Union address and in supplementary materials, the President rightly stated the need to hold colleges accountable for cost, value and quality before they receive federal funds, and he raised the need to reform accreditation so that it focuses on performance and results. In the report submitted to you last April, a bipartisan group of NACIQI members suggested just such an alternative, focused on quality and cost. We urge you to pursue it, and have enclosed a copy for your review (<http://www2.ed.gov/about/bdscomm/list/naciqi-dir/2012-spring/teleconference-2012/naciqi-final-report.pdf>, pg. 11).

As explained in the attached response to the Department of Education, SACS' action falls outside its legitimate authority and amounts to the wielding of federal power in clear violation of the principles of federalism and the U.S. Constitution. Its contention that the UVA Faculty Senate should have received advance notice of the board's intention to terminate a president truly stretches policies on shared governance beyond any reasonable interpretation.

Clearly, if the Department is unwilling or believes it is unable to step in when accreditors act outside their rightful authority, it is time to reform the Higher Education Act and develop an alternative system of quality assurance.

Sincerely,



Anne D. Neal
President

Enclosures

cc: Acting Assistant Secretary David A. Bergeron

ACTA Response to Department of Education Determination
dated February 11, 2013

In his response, Acting Assistant Secretary David Bergeron declines to review matters pertaining to the Southern Association of Colleges and Schools' (SACS) interference with the University of Virginia's governing board and claims that SACS has violated no federal rules.

As explained below, DOE is wrong on both counts. SACS' attempt to overrule the authority vested by Virginia state statute in the University of Virginia Board of Visitors is a clear use of federal power in violation of the United States Constitution. Moreover, SACS has violated DOE regulations prescribing standards for recognized agencies.

I. SACS' action clearly falls outside its legitimate authority and amounts to the misuse of federal power in clear violation of the principles of federalism and the U.S. Constitution.

The Department contends that it can do nothing if accreditors interfere in state governance matters (see Section III, below) because Congress has not expressly listed governance in the authorizing statute, and regulations do not give DOE authority over other matters.

Citing the Secretary's Criteria for Recognition list of twelve areas, 34 CFR § 602.16(a)(1) and 20 U.S.C. § 1099b(a)(5), the Department contends that "[t]hese required accrediting standards do not include governance, and . . . the Department does not have authority to find an agency out of compliance with respect to agency accrediting standards not required by that law." In other words, according to the Department of Education, there is no oversight of accrediting agencies if they adopt conditions for eligibility that are not ones specified by the U.S. Congress.

The argument that any action beyond those enumerated is beyond the reach of the DOE is unreasonable. By the DOE's reckoning, accreditors—who serve as agents of the federal government in their role as gatekeepers for billions of federal dollars—have virtually limitless discretion if they develop standards outside the specific statutory framework.

The argument also ignores relevant precedent. In 1994, both the Secretary of Education and NACIQI prohibited an accrediting agency from imposing diversity requirements on an institution's governing board. The Department concluded that it was not appropriate for an accrediting agency to wield what amounted to federal power in a matter that threatened institutional governance and autonomy. Thus, the DOE has precedent for using its appropriate authority as the federal agency that oversees accreditation to give warning to cease and desist from rogue accrediting practices.

Under any reasonable interpretation of existing rules, moreover, the Department is putting form over substance by excluding "governance" from the "required accrediting

standards” enumerated in 34 CFR § 602.16(a)(1) and 20 U.S.C. § 1099b(a)(5) as a pretext for its refusal to review SACS’ abusive action. While the statute and attendant regulations do not specifically say *governance*, they do include standards concerning *administration*. And in its standards, SACS notably couples “*Governance and Administration*” as one subsection, conceding that the two are inextricably intertwined. For DOE to suggest that governance matters are beyond its review is like saying the results of nationally-normed assessments of student learning represent a topic beyond their purview since such assessments are not specifically referenced.

The Department suggests that the trigger for its participation is a complaint from the institution or SACS. This conclusion is also unreasonable. Since the Commission is imposing the requirements on institutions it oversees, it cannot be expected to second-guess itself. Nor can we assume that any board of trustees will contest the accreditor’s finding when to irritate the accreditors puts billions of federal dollars in student financial aid at stake.

If the entity responsible for promulgating and enforcing the recognition criteria refuses to assess whether an accreditor exceeds its statutory authority, who, then can protect the public interest and the interest of institutions to be freed of undue federal interference? SACS’ action falls outside its legitimate authority and amounts to the wielding of federal power in clear violation of the principles of federalism and the U.S. Constitution. Clearly, if the Department is unwilling or believes it is unable to step in, Congress needs to reject the Department’s interpretation and substantially reform the Higher Education Act which allows such abuse to occur.

II. The Department has ignored SACS’ failure to adhere to its own rules.

SACS claims that UVA has failed to set out a policy on faculty governance. That claim is false. In fact, SACS’ issue is not the *absence* of policy on faculty governance, but rather the *substance* of its policy on faculty governance.

The Department relies upon SACS’ finding that the responsibility and authority of faculty in academic and governance matters “remains unclear.”¹ But UVA’s correspondence to SACS of September 20, 2012, makes UVA policy explicitly clear, citing the Constitution and By-Laws of the Faculty Senate:

The Faculty Senate represents all faculties of the University with respect to all academic functions such as the establishment and termination of

¹ Following UVA’s September 20 submission to SACS, the accrediting agency requested additional information on two specific points. The first point raised by SACS was an apparent “lack of an identified procedure related to the removal of the institution’s President.” UVA explicitly identified its Board of Visitors Manual section 4.21 providing that “the President shall be elected by the BOV and may be removed only by assent of two-thirds of the whole number of Visitors,” and also cited additional board resolutions further delineating procedures for presidential assessment. The second point was SACS’ contention and interpretation that UVA’s policy of granting the Faculty Senate an advisory role “concerning educational and related matters affecting the welfare of the University,” obligated the Board to notify the Faculty Senate of its intentions to terminate the president. (SACS letter, Oct. 5, 2012)

degree programs, major modifications of requirements for existing degrees, and action affecting all faculties, more than one faculty, of the University. Additionally, the Senate shall *advise* the President and the Rector and Board of Visitors concerning educational and related matters affecting the welfare of the University. (emphasis added)

Whether SACS or the Department likes it or not, the Faculty Senate plays an *advisory* role to the President, Rector, and Board of Visitors in governance matters.

Despite the accrediting agency's statement that Comprehensive Standard 3.7.5 "does not dictate what the responsibilities of faculty should include," the agency is actually requiring otherwise. As SACS asserted in its October 5, 2012 letter to UVA: "it would seem that though the Board of Visitors has the ultimate responsibility for hiring, evaluating, and if necessary, firing the President, *the Faculty Senate should have been notified of the intentions of the Board's actions.*" (emphasis added)

Indeed, there is no reason for SACS to comment on the *substance* of an institution's policy, if the agency's standard on policies is, as it contends, substance-neutral.

III. By sanctioning UVA based on its unwillingness to "clarify" its policy on faculty role in governance, SACS' action is an overreach of federal power.

The board of visitors' plenary power is explicitly set forth in state law: Va. Code § 23-69 grants the board general corporate powers. Moreover, Va. Code § 23-76 charges the board with the responsibility of appointing a university president, whose powers are "under the authority of the board." Yet it is this power with which SACS takes issue.

The accrediting agency also sanctioned UVA due to an apparent failure to uphold the accreditor's standard to "prevent control by a minority of the board, or by organizations or interests separate from the Board." Yet the vagueness of this standard demonstrates SACS' overreach. Virginia law permits a quorum of five board members to meet and take action on behalf of the board. Va. Code § 23-74.

IV. The Department declined to give consideration to a prejudicial public statement by SACS President Belle Wheelan, in which she told a group of trustees at an event that they would be "meddling" if they interfered in anything beyond making policy, and hiring, evaluating and possibly firing the institution's president.

The Department's rationale in doing so was that "the statement . . . does not mention UVA, nor is it directed to either of the SACS-COC standards on which the Commission's decision regarding UVA rested."

Again, we disagree. President Wheelan's words were spoken *at an orientation event for new trustees of Virginia institutions*, which included members of UVA's Board of

Visitors. Wheelan in her role as president actively discouraged trustees from exercising their statutory authority. The public statement goes directly to the matters of administration and governance that are the focus of SACS' standards on which the Commission's decision relied.

V. SACS' policymaking procedures are opaque and restrictive, ensuring that the status quo will continue.

The Department encourages UVA, as a member institution, to work within the accrediting agency's policymaking framework "to change the standards on governance and on the faculty role in governance." Yet the procedures by which trustees may petition accreditors for "permission" to govern their own institutions, virtually guarantee that any such attempt would be futile.

Current SACS policy allows any institution—or any member of the general public—to submit a written proposal to amend any of the accrediting agency's Principles of Accreditation standards. However, even if the proposal survives scrutiny by the SACS Board of Trustees or its committees, any proposed modification may be rejected by the College Delegate Assembly, comprised entirely of member institution presidents or their designated representatives.



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF POSTSECONDARY EDUCATION

THE ASSISTANT SECRETARY

FEB 11 2013

Anne D. Neal
President
American Council of Trustees and Alumni
1726 M Street, Suite 802
Washington, DC 20036

Dear Ms. Neal:

Thank you for your letter, addressed to both Secretary Duncan and Kay Gilcher, regarding the action taken by the Southern Association of Schools and Colleges, Commission on Colleges (herein, SACS-COC, Commission, or agency) to place the University of Virginia (UVA) on warning. In your letter you state that the action taken by SACS-COC appears to fall outside the agency's legitimate authority. You ask that the Department investigate whether the agency, which you describe as a "federal accreditor," has violated regulations in 34 CFR part 602 "prescribing standards for recognized agencies."

You contend that SACS-COC has suggested that UVA's Board of Visitors (herein, Board) must give the UVA Faculty Senate advance notice of its intention to terminate the UVA President. In your view, the Commission thereby intruded on the Board's authority and responsibilities under state law and to the public. In addition, you state that the Commission of over 70 members does not seem to include any trustees and assert, citing a Richmond Times Dispatch article, that a comment made in public by SACS-COC President Belle Wheelan on a governance issue was inappropriate.

Finally, it appears you believe that SACS-COC standards pertaining to governance, two of which were relied upon in the warning issued to UVA, are unrelated to academic quality and exceed any permissible role for the agency under state law.

I am pleased to respond on behalf of the Department. As a preliminary matter, it is important to note that the Department's authority over accrediting agencies is circumscribed by federal law. The Department is authorized to promulgate, and enforce, the accrediting agency recognition criteria required by the Higher Education Act of 1965, as amended (HEA). See 20 U.S.C. §§ 1099b(a), (l), (n). But the HEA goes on to state that "Nothing in this chapter shall be construed to prohibit or limit any accrediting agency . . . from adopting additional standards *not provided for*" in that law. 20 U.S.C. § 1099b(g) (emphasis added). Furthermore, the Department is expressly barred from dictating agency accrediting standards. 20 U.S.C. §§ 1099b(g), (o).

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The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

In addition, the agencies the Department recognizes are not "federal accreditors." They are private, voluntary membership organizations. See 20 U.S.C. § 1099b(a). Secretarial recognition is a status agencies voluntarily seek, and recognized agencies receive no federal funds. Although an agency cannot be recognized by the Secretary unless the federal government relies on its accreditation decisions in some fashion, see 20 U.S.C. § 1099b(m), the agency, even if recognized, is free to engage in other accrediting activities that have no "federal link."

Given this legal framework, our consideration of your complaint must focus on the Commission's compliance with the regulatory Criteria for Recognition in 34 CFR Part 602. See 20 U.S.C. § 1099b(n)(3) ("the Secretary shall not, under any circumstances, base [recognition] decisions" on any other criteria). As such, in reviewing your complaint, the Department must do so based on the requirements of specific regulatory criteria

In investigating your complaint, my staff contacted SACS-COC and requested a copy of the decision letter, which was sent to the Department on January 15, 2013, at the same time it was sent to the president of UVA, with a copy to the Chair of the Board. The letter includes a description of the two findings on which the Commission based its decision, as discussed below.

Core Requirement 2.2

In finding UVA out of compliance with Core Requirement 2.2 (Governing Board),¹ the Commission acknowledged in its letter that the institution had revised its policy outlining removal of the president. However, the institution did not provide information on the specific procedure for such a removal. In particular, the Commission wanted to have evidence of there being safeguards in place to "prevent control by a minority of the board, or by organizations or interests separate from the Board." Core Requirement 2.2 includes the specific language regarding minority control, and the Commission's position that UVA must provide evidence of how it will meet that requirement in order to be found in compliance is in accordance with commonly-accepted accreditation practices and the agency's published guidance to institutions in its *Resource Manual for the Principles of Accreditation: Foundations for Quality Enhancement*, page 10 (<http://www.sacscoc.org/pdf.Resource%20Manual.pdf>).

Comprehensive Standard 3.7.5

In finding UVA out of compliance with Comprehensive Standard 3.7.5 (Faculty role in governance),² the Commission acknowledged that UVA has taken steps to increase faculty involvement in academic and governance matters, but found that the responsibility and authority

¹ Omitting a paragraph that is addressed exclusively to federal military academies, and accordingly is not applicable here, Core Requirement 2.2 states as follows: "The institution has a governing board of at least five members that is the legal body with specific authority over the institution. The board is an active policy-making body for the institution and is ultimately responsible for ensuring that the financial resources of the institution are adequate to provide a sound educational program. The board is not controlled by a minority of board members or by organizations or interests separate from it. Both the presiding officer of the board and a majority of other voting members of the board are free of any contractual, employment, or personal or familial financial interest in the institution."

² Comprehensive Standard 3.7.5 states as follows: "The institution publishes policies on the responsibility and authority of faculty in academic and governance matters. (Faculty role in governance)"

of faculty in academic and governance matters “remains unclear.” The *Resource Manual for the Principles of Accreditation: Foundations for Quality Enhancement*, pages 77-78, informs institutions that published policies on the responsibility and authority of faculty in academic and governance matters must “explicitly delineate the responsibilities and authority of its faculty in academic and governance matters.” The guidance also includes that institutions need to provide evidence documenting the faculty role in academic and governance affairs. In requiring UVA to establish compliance with this standard, SACS-COC is acting in accordance with its published guidance and with commonly-accepted accreditation practices.

With regard to your specific allegations –

- that SACS-COC is out compliance with regulations in 34 CFR part 602 “prescribing standards for recognized agencies,”

the Secretary’s Criteria for Recognition list twelve areas in which an agency must have accrediting standards. See 34 CFR § 602.16(a)(1). The language in the regulations is taken directly from the Higher Education Act of 1965, as amended (HEA). See 20 U.S.C. § 1099b(a)(5). These required accrediting standards do not include governance, and, as discussed above, the Department does not have authority to find an agency out of compliance with respect to agency accrediting standards not required by that law.³

The HEA, and implementing regulations in 34 CFR § 602.16(f)(1), allow an accrediting agency to set, with the involvement of its members, and apply, accreditation standards for or to institutions or programs that seek review by the agency. As a member of SACS-COC, UVA could work to change the standards on governance and on the faculty role in governance.

- that SACS-COC suggested that the Board of Visitors must give the Faculty Senate advance notice of its intention to terminate the president,

the SACS-COC decision letter, which is the formal notification of the Commission’s actions and requirements, does not contain directives to the institution on what its policies must include. In fact, the letter states that the Comprehensive Standard 3.7.5 “does not dictate what the responsibilities of faculty should include.” Rather, it expects an institution to publish and adhere to policies “that clarify the role of faculty in relation to other constituencies regarding the fundamental academic and governance aspects of the institution.”

- that SACS-COC does not include trustees,

³ Even if we had such authority, which we do not, we could not say that SACS-COC was unreasonable in concluding that there is, or can be, a relationship between academic quality and the factors addressed by the two SACS-COC standards applied by SACS-COC here. We note that standards such as this are common among accreditors, and as such reflect their experience, which in turn is informed by the experience of their institutional members.

neither the HEA, nor the Secretary's Criteria for Recognition, nor SACS-COC's bylaws or policies require inclusion of trustees on the Commission. Again, as a member of SACS-COC, UVA could seek to persuade the agency to include such a requirement.

- that the statement by the agency President quoted in the Richmond Times-Dispatch prejudiced SACS-COC and discourages boards of trustees from exercising their fiduciary responsibilities,

the statement you have quoted does not mention UVA, nor is it directed to either of the SACS-COC standards on which the Commission's decision regarding UVA rested. Wheelan's statement concerned working relationships between boards of trustees and university presidents, whereas the Commission's findings relate to publication of Board of Visitors policies as to the role of faculty, and governance by less than a majority of the Board. Moreover, Wheelan is not a Commission member, nor was she entitled to vote on UVA's accreditation status.

We have no details or context beyond those provided in the news article, and those do not manifest a compliance issue under the Criteria.

- that SACS-COC's Comprehensive Standard 3.7.5 (Faculty role in governance) violates State law or would require UVA's Board of Visitors to do so,

you provide no citation to any Virginia statute or regulation which the Commission is alleged to have violated, or which you believe the Commission is causing the UVA Board of Visitors to violate. It is the role of the State, and not the Department, to interpret state laws, and to enforce them as so interpreted. Intervention by the Department would be overstepping. Significantly in terms of our role, neither the Commission nor the University has complained to us of a conflict.

Moreover, even if we accept, for present purposes, the position that the "authority of the UVA board is plenary" under state law, we do not see why it would be outside the scope of those plenary powers for the Board to seek to obtain, and to maintain, accreditation from the Commission, even though that accreditation is conditioned on compliance with the Commission's standards. Clearly that is what the Board has done. It is also within the scope of power that is plenary to decide whether, or not, the Board will act through a minority of its members; whether to promulgate a policy reflecting that decision; and whether or not to fix, and once fixed publish, policies as to its relationship with faculty. Standard 3.7.5 is quite general in nature and it is difficult to imagine what kind of state law it would contravene -- in fact, on its face it does not purport to prescribe board policy in any respect, and the Commission's letter appears to interpret and apply it precisely in accordance with its terms. You do not appear to be contending that the Commission is precluded by state law from putting the University on warning or that the State has prohibited the Commission from conducting in-state accrediting activities.

In sum, we believe we understand, and we respect, your views as to the important roles of boards of trustees in governance and oversight. After inquiring into the matters you raise, however, we

have concluded that no violation of federal law has occurred. That is where the role given to us to implement the recognition process ends. We do sincerely appreciate your having communicated your concerns. The more informed we are, the better policy decisions we can make, within the scope of the authority we have been given.

Sincerely,

A handwritten signature in blue ink that reads "David A. Bergeron". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

David A. Bergeron
Acting Assistant Secretary

cc: Dr. Belle Wheelan, SACS-COC

December 31, 2012

The Honorable Arne Duncan
Office of the Secretary
U.S. Department of Education
LBJ Education Building, 7W311
400 Maryland Avenue, SW
Washington, DC 20202

Ms. Kay W. Gilcher
Director, Accreditation Division
Office of Postsecondary Education
U.S. Department of Education
1990 K Street NW, Room 8027
Washington, DC 20006

Via email

Dear Secretary Duncan and Ms. Gilcher:

Earlier this month, the Southern Association of Colleges and Schools Commission on Colleges (SACS) placed the University of Virginia “on warning.” As outlined below, the action would appear to fall outside the accreditor’s legitimate authority and constitute a blatant intrusion into governance powers originally established by Thomas Jefferson, then codified by the Virginia Legislature to remain solely the purview of the Board of Visitors.

If federal accreditors are allowed to substitute their judgment in matters of state law and governance whenever internal constituencies feel aggrieved, they will bring about the sure erosion of institutional autonomy and undermine the ability of governing bodies everywhere to provide needed oversight.

The notion, suggested by SACS, that the board must give the Faculty Senate advance notice of its intention to terminate the president is both ludicrous and in utter violation of the board’s statutory and fiduciary responsibility to serve the public interest. Whether the accreditors like it or not, the authority of the UVA board is plenary. The board has responded fully and in considerable detail to the accreditor’s queries, noting that the university manual and the policies governing the board make clear that they are fully responsible for their own institution. It appears that SACS’ real issue is not the *absence* of board policy, but the *substance* of the board’s policy.

The accreditor has provided no evidence whatsoever that UVA is failing to meet a basic threshold of academic quality required for accreditation, leaving the question of the motive of their interference.

The Commission of over 70 members which reviewed the UVA response and sanctioned UVA, consists of college presidents, faculty and administrators; there appear to be no trustees. Moreover, SACS President Belle Whelan has been outspoken in her view of higher education governance, recently telling boards of trustees, according to a news account, that they have two roles only: making policy, and hiring, evaluating and possibly firing the president. “That’s it,” she said. “Anything else, you’re meddling.” (“Accrediting agency board to consider U.Va. sanctions,” *Richmond Times-Dispatch*,

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Oct. 24, 2012). Public speech of this nature from an accrediting official wielding power over an institution prejudices a fair and objective determination and discourages this board, and any other board for that matter, from exercising its fiduciary responsibilities.

Congress has made accreditors gatekeepers of federal funds. Yet SACS' action against UVA has *nothing* to do with protecting students or taxpayers by guaranteeing educational excellence. To the contrary, SACS' action would appear to constitute an effort to supplant those who are, by statute, responsible and whose plenary legal powers are established by the state legislature and attendant rules and regulations.

SACS' actions raise serious questions about its compliance with Department of Education regulations prescribing standards for recognized agencies. We believe there is substantial reason to believe that the accreditor has inappropriately become involved in a power struggle between the president, faculty, and the board of trustees and urge you to investigate.

Sincerely,

Anne D. Neal

Anne D. Neal
President
American Council of Trustees and Alumni